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COMMANDEERING ORDER AS A DEFENSE TO BREACH OF CONTRACT.

A subject of vital importance in the law of contracts, upon which there is, relatively speaking, a minimum of authority, is rare today. So vast and varied is the volume of American law alone, state and federal, civil and criminal, substantive and procedural, so generous are our courts with opinions, so ample and thorough are our reporting, digesting and annotating systems that the tendency is to become surfeited with authority.

War, however, is a great disturber of established lines of thought and conduct. Our nation, free for fifty-two years from internal or foreign conflict, with the *de minimis* exception of the incident with Spain, faced in April, 1917, the mightiest task of its life—the imparting to a German bigot the lesson that the worst of his many mistakes was the ignoring of the American people as a possible determining factor in the world-contest which he had precipitated and which had raged for three years, undoubtedly to the near-exhaustion of all the belligerents. The gage of battle was thrown down with the confidence of a madman. It was as promptly picked up with the courage of a people conscious only of the highest motives, and already, it may be said even in the pages of a matter-of-fact law magazine, the madman sees the beginning of the end and the proportions of his mistake.

The change from peace to war is naturally reflected in our law reports. The indices of today contain the title "War" and we examine them with interest for rulings upon certain of the many phases of that absorbing subject. We can concern ourselves here with but one of these, namely, *the effect of a commandeering order and resulting compliance therewith upon the rights and liabilities of the parties to an executory contract, the subject matter of which was the property commandeered.*

The word "commandeer," as such, is not defined in our standard law dictionaries or in word and phrase books

The Encyclopedia Brittanica says that it is "from the South African Dutch *commanderen,* to command—properly, to compel performance of military duty in the field, especially of the military service of the Boer republics; also to seize property for military purposes; hence used for any peremptory seizure for other than military purposes."

We may accept this definition as sufficient for present purposes and proceed with the inquiry as to the legal consequences of a commandeering order in the particular indicated. Instance: A, the proprietor of an ice- manufacturing plant, contracted with B that for a price of $2.50 per ton, he will deliver to B the entire output of the plant, not less than a certain number of tons monthly, throughout the year 1918. The deliveries are made in accordance with the contract until August, when the Quartermaster's Department at Washington serves notice that the entire output of A's ice-plant will be taken over by the government for the use of the military camps in Virginia and nearby states at a price of $3.00 per ton. A tenders B a sum equal to fifty cents per ton for all ice made by him and taken over by the government. *Quaere:* Is he further liable to B for a breach of the contract?

The answer is, No, if that is the whole case, but otherwise if A voluntarily entered into a contract with the United States which prevents him from carrying out his contract with B.

As has been suggested the decisions in point are few. Strangely enough, the text-books and "encyclopaedias" of law, under the titles of "Contracts," "War" or elsewhere, devote but scant space to the subject. And yet not only is its practical importance manifest, but it would seem most natural that in one form or another the question would have definitely arisen out of transactions incident to one of the six wars in which the nation has taken part and that the principle would long since have been definitely formulated in this country. Perhaps, indeed, it has been, but if so, the present writer has not found the decisions. In the case presently to be mentioned, the Court said: "What is meant by 'placing an order?' and what must be done to constitute the 'placing of an order,' within the meaning of this statute: are questions to be settled. I know of no judicial interpretation of these statutes in the respects referred to."

The case is *Moore & Tierney, Inc.* v. *Roxford Knitting Co.*, decided July 1, 1918, by the United States District Court for the Northern District of New York, and reported 250 Federal Reporter, 278. The propositions enunciated are at once so fundamental and controlling of related questions that no apology is necessary for giving the syllabus in full:

Under National Defense Act, § 120, and Navy Appropriation Act March 4, 1917, c. 180, it is the duty of a manufacturer, where the United States orders war supplies, to comply with the order, though that prevents him from carrying out earlier contracts with private parties; but where a manufacturer voluntarily enters into contracts with the United States, which prevent him from carrying out earlier contracts, he is not relieved from an action of damages for breach.

Where a manufacturer, after communication with a member of the Advisory Board of National Defense, and being informed that the orders were obligatory, contracted to supply underwear for the navy, *held*, that the order must be deemed to have been placed in accordance with National Defense Act, § 120, and Navy Appropriation Act March 4, 1917, c. 180, making compliance obligatory; so the manufacturer was not liable for breach of contracts with private persons, which he was unable to carry out because of the navy contract.

As great publicity was given to National Defense Act, § 120, and Navy Department Act March 4, 1917, c. 180, which authorizes the government in time of war to place compulsory orders with manufacturers and for supplies, manufacturers and private persons with whom they contract must be presumed to have contracted with reference to such laws.

In view of the paramount war-making power of Congress, National Defense Act, § 120, and Navy Appropriation Act March 4, 1917, c. 180, authorizing the government to place compulsory orders with manufacturers for needed supplies, are valid.

Within Navy Appropriation Act March 4, 1917, c. 180, allowing the government in time of war to place compulsory orders with manufacturers for war material, and defining "war material" as including arms, ammunition, armament, stores, supplies, and equipment for ships, underwear for the crews of war vessels is part of the "stores and supplies."

The opinion by Judge Ray is instructive and able. Its first paragraph narrates the skeleton facts as follows:

> "At the time war was declared between the United States of America and the Imperial Government of Germany the plaintiff, engaged in manufacturing knit underwear, had a valid contract or contracts with the defendant, by the terms of which it was obligated to make and deliver to defendant certain quantities of woolen knit undershirts and drawers at agreed prices and at or within specified times. These contracts came into existence by way of accepted orders, which were subject to delays or non-delivery by strikes, accidents, or for any reason beyond the control of plaintiff. It was then engaged in the performance of such contracts, and intended in good faith to perform, but was prevented by the performance of certain government orders. The plaintiff is one of several manufacturers of such goods, located at Cohoes, N. Y. Deliveries aggregating $14,090.08 were made and not paid for, and considerable quantities were not delivered. Defendant alleges $20,000 damages for non-performance or alleged breach of contract."

Illustrative of the strong hand of government—literally the *vis major*—is the following statement:

> "May 22, 1917, one A. Frey, who was a member of a committee of the Advisory Board of National Defense, wrote each of these manufacturers at Cohoes, N. Y., including the plaintiff, informing them that the United States government was in need of and desirous of obtaining knit underwear and drawers, inquiring as to the capacity of the mills of the manufacturers and the quantities they could furnish, at what prices, and also saying:
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> "'I would request you not to write me that you are sold up and can not furnish any of these goods. I am aware that this condition prevails with every one. * * * It is not the committee's intention to place the whole burden on any one mill, but to divide it according to production, and I would therefore request you to give this your prompt attention and advise me promptly how much of this it will be your pleasure to take, and at what prices.'"

On receiving these communications, the manufacturers called a meeting, where it was agreed that the government requirements constituted an order to which it was their duty to respond. Each manufacturer was left to figure out what he could furnish, a com-

mittee was appointed to confer with the proper government official and was advised by him that the requirement was obligatory. Further correspondence resulted in a confirmation of the necessity of the demand, which was at first more than Moore & Tierney, Inc., could produce, but later the order was modified, accepted and filled.

The opinion is most interesting and should be carefuly perused. Space limitations alone prevent the insertion here of the language embodying the views presented by the syllabus, *supra*. The common sense of the question, however, is succinctly presented in the following paragraph:

> "If, after entering into these agreements, respectively, the plaintiff had refused to perform, I think it would have become liable to the United States, not only for damages, but to the pains and penalties of the act, and that the government lawfully could have and probably would have taken summary possession of its plant or factory, and would have been justified in so doing. The plaintiff would have been liable to a criminal prosecution and a charge of disloyalty."

The Court of King's Bench took substantially the same view of the question in the case of *Lipton, Limited*, v. *Fond*, (1917) 2 K. B. 647; 86 L. J. K. B. 124; 116 L. T. 632; 15 L. G. R. 699; 33 T. L. R. 459.

An action was brought to recover damages for breach of contract to deliver forty-one tons of raspberries, the undelivered balance of a total quantity of fifty tons at 19£ a ton under a written contract dated July 27, 1916. The defendant pleaded that he was excused in whole or part from performance by reason of the necessity for complying with a requisition made on him on August 17, 1916, by the Army Council for the supply to it of all the raspberries then at his disposal.

By the Defense of the Realm Act, 1915 (5 Geo. 5, c. 37), it was provided:

> "It is hereby declared that where the fulfilment by any person of any contract is interfered with by the necessity on the part of himself or any other person of complying with any requirement, regulation, or restriction of the Admiralty or the Army Council under the Defense of the Realm Consolidation Act, 1914, or this Act, or any regulations made thereunder,

that necessity is a good defense to any action or proceedings taken against that person in respect of the non-fulfilment of the contract so far as it is due to that interference."

Regulation 2B of the Defense of the Realm Regulations is as follows:

"It shall be lawful for the Admiralty or Army Council or the Minister of Munitions to take possession of any war material, food, forage and stores of any description and of any articles required for or in connection with the production thereof. If, after the Admiralty or Army Council or the Minister of Munitions have issued a notice that they have taken or intend to take possession of any war material, food, forage, stores or articles in pursuance of this regulation, any person having control of any such material, food, forage, stores or article, sells, removes, or secretes it, without the consent of the Admiralty or Army Council or the Minister of Munitions, he shall be guilty of an offence against these regulations."

The Attorney General appeared as *amicus curiae*. The Court, on June 21, 1917, handed down an opinion holding that Regulation 2B is within the power given to His Majesty in Council by the Defense of the Realm Act and is, therefore, not *ultra vires;* further that an exercise of the powers under the regulation for the purpose of procuring a substantial quantity of a necessary supply (e. g., raspberries) for the use of the troops is an exercise of the powers for securing the public safety and defense of the realm. Said ATKIN, J.

"The first objection made was that the regulation did not purport to limit the power of the Admiralty or Army Council or Minister of Munitions to take possession of cases where it was necessary for the public safety or defense of the realm, as in the case of the powers given to the competent naval or military authority under reg. 2, and that the regulation was not well made under the regulation-making powers given by s. 1., sub-s. 1. of the Defense of the Realm Act, 1914. In any case, it was further contended that taking possession of a crop of raspberries could not be necessary for the public safety or defense of the realm. I do not think those arguments well founded. I think that all that I have to see is whether the regulation is one that is reasonably capable of being a regulation for securing the public safety and defense of the realm. If it is, I do not think the Court is entitled to

question the discretion of the Executive, to whom Parliament has entrusted powers in such wide terms. I see no reason why a regulation giving powers in these general terms to important departments should not be considered advisable for securing the defense of the realm. I doubt whether I have to further consider whether, in exercising powers in general terms by the regulation, the Army Council or other authority are in fact acting for the public safety, though I understand the Attorney-General to concede that an exercise of the power under the regulation would not be valid unless it was in fact for the public safety. I am inclined to think that the regulation meant to give an unrestricted power to the bodies named, trusting them to exercise the power in the public interest and leaving the subject who thought he was oppressed to his proper remedies for an oppressive use by the Executive of their legal powers. But in any case I am satisfied from the evidence that an exercise of the powers under the regulation, as in this case, for the purposes of procuring a substantial quantity of a necessary supply for the use of the troops was an exercise of the powers for securing the safety of the public and the defense of the realm."

The opinion concludes as follows:

"The only question that remains is to what extent was the contract interfered with. I think the reasonable view to take is that if the Army Council had not intervened the seller would have distributed what raspberries he had after that date in equal proportions towards satisfaction of the amounts undelivered."

The learned judge then carefully analyzed the figures given in evidence, and came to the conclusion that the defendant was excused from delivering about 16 tons 12 cwts., leaving about 24 tons 15 cwts. undelivered without legal excuse, and that the right amount to allow the plaintiffs would be 15£ per ton. He accordingly gave judgment for the plaintiffs for 371£ 5s. with costs.

The practical importance of the subject is manifest and cases involving directly and collaterally the proper construction of the National Defense Act of Congress will doubtless not be uncommon in American reports for some time to come. An interesting phase was recently presented to the Circuit Court of Northumberland County, Virginia. Plaintiff had been employed by defendant as captain of a vessel to engage in menhaden fishing at a com

pensation of thirty-five hundred dollars for the fishing season. Upon the eve of the first trip, however, the vessel was commandeered by the federal government and taken to other waters. Plaintiff, after notice to defendant, sought and obtained other employment for the fishing season at a compensation of nineteen hundred dollars. Upon the conclusion of the season he demanded of defendant sixteen hundred dollars, the difference between the sum agreed to be paid by it and the sum earned by him. Payment being refused, suit was instituted and a judgment was rendered for plaintiff for the amount claimed. No appeal was taken. It is not perceived why the defense of *vis major* would not have been available to the defendant, whose ability to keep his contract was as completely taken away as was that of the respective defendants in the underwear and raspberry cases.

There can be little doubt of the substantial correctness of the principal rulings mentioned. The private purchaser may be and doubtless is seriously inconvenienced and damaged by the priority given to the government but though he may seek redress from the government, it is loss without injury so far as a possible recovery against the seller is concerned. Nevertheless it behooves the seller to consider carefully each case which presents itself, for we have seen that both in the American and the English cases, *supra,* the courts were most astute to exclude from the protection of the respective statutes vendors or contractors whose defense for breach of contract does not come altogether and abundantly within the spirit of the law.

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